Supreme Court, U.S.
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No. 00-482

IN THE
Supreme Court of the United States

INTERNATIONAL BUSINESS MACHINES CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Government responds to the statutory component of the first question presented,[1] by arguing that petitioner is not entitled to receive interest under 28 U.S.C. § 2411 because that statute does not "directly and unambiguously provide for an award of interest for customs assessments." Brief In Opposition ("Br. In Opp.") at 5. This Court, however, directly, unambiguously, and unanimously determined in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998) that the Harbor Maintenance Tax, 26 U.S.C. §§ 4461-4462 ("HMT"), was *not* a "customs assessment," but a "*tax*

[1] The first question presented has three components: Whether the court of appeals misconstrued 26 U.S.C. § 4462(f)(3) in light of the decision in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), the preclusive effect of the final judgment entered thereunder, and the "constitutional requirements" exception to the "no-interest" rule noted in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986).

on exports in operation as well as nomenclature . . . despite the label Congress has put on it[.]" *Id.* at 367 (emphasis added). And, that tax was held to be unconstitutional. *Id.* at 370. Since 28 U.S.C. § 2411 requires that federal courts award interest on *tax* refunds and complies with the restrictions of 26 U.S.C. § 4462(f)(3), the United States Court of International Trade ("CIT") entered an order implementing this Court's decision in *United States Shoe Corp.* by awarding petitioner both a refund of the monies paid under the HMT on exports and interest on those payments. App. 35a.

By failing to accord deference to this Court's prior ruling that the HMT on exports was a *tax*, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") ignored long established rules "developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." Charles Alan Wright, Arthur R. Miller & Edwin A. Cooper, *Federal Practice and Procedure* § 4478 (1981); *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 815 (1988) (citations omitted) (The law-of-the-case doctrine is a "rule of law, that [a] decision should continue to govern the same issues in subsequent stages in the same case.[2] This rule of practice

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[2] As a matter of law, the instant case is a continuation of the same action previously before this Court in *United States Shoe Corp.* After this Court issued its March 31, 1998 decision, the CIT was advised that the plaintiff in *United States Shoe Corp.* was not in a position to litigate its claim for the payment of interest on the HMT export refunds required as a result of the Court's decision in *United States Shoe Corp.* The CIT then entered a judgment on June 17, 1998 with the consent of all parties, wherein the record and all prior orders in *United States Shoe Corp.* were "deemed filed" in *International Business Machines Corp.* v. *United States.* App. 35a. This judgment also awarded petitioner a refund of the HMT paid on exports together with interest pursuant to 28 U.S.C. § 2411.

The Government correctly notes that the CIT also entered a similar judgment on June 26, 1998 in *United States Shoe Corp.* (Supp. App. 58a), from which the Government filed a notice of appeal in the Federal Circuit on August 7, 1998. Br. In. Opp. at 3, note 1. United States Shoe, however, filed a motion in the Federal Circuit to stay any further briefing until the

promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'").

The Court's decision in *United States Shoe Corp.* settled that the HMT is a tax and because that tax is a tax on exports, it is unconstitutional, which necessarily required the CIT to remedy the constitutional harm imposed making petitioner whole by refunding the monies paid pursuant to the HMT on exports and interest earned on those monies. A federal court has no discretion under 28 U.S.C. § 2411 concerning the award of interest. ("[I]nterest *shall* be allowed.") App. 43a. (emphasis added). Moreover, since 28 U.S.C. § 2411 is outside the scope of Subtitle F and does not in any respect regulate "the administration and enforcement of internal revenue taxes"[3] the CIT's award of interest under 28 U.S.C. §

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proceedings in the instant case were concluded, which was granted. Supp. App. 61a. For the convenience of the Court, both of these orders are reprinted in a supplemental appendix following the text of this brief.

Petitioner assumes that the Government raised the technical pendency of its appeal in *United States Shoe Corp.* to suggest that docket has vitality in the Federal Circuit. The principles of finality and repose that should have been raised to bar the Government from appealing the CIT's 1995 judgment and preclude the Federal Circuit from asserting jurisdiction over the Government's appeal of the CIT's award of interest will bar the Government if it attempts to continue to pursue that appeal.

[3] The Government does not dispute that over 7,000 taxpayers will be affected by the disposition of this case where millions of dollars are at stake because the Government violated the Constitution and seeks to benefit financially from its offense. Presumably those taxpapyers are to take solace in being advised that "The money placed in the [HMT] Fund, and interest earned on those monies, may be withdrawn only by appropriation for specified purposes." Brief In Opp. at 7 note 3 *citing* 26 U.S.C. § 9505(b), (c). 26 U.S.C. § 9505(b), however, speaks only to "amounts equivalent to the taxes received" *not* interest earned thereunder and 26 U.S.C. § 9505(c) speaks only to "amounts available . . . for making expenditures." Therefore, no apparent appropriations constraints are contained in 26 U.S.C. § 9505(b), and under 26 U.S.C. § 9505(c), it is far from clear that interest earned on monies paid into the HMT Fund have been "withdrawn only by appropriations for specified purposes," since the most recent Annual Report to Congress on the Status of the HMT Fund states: "the . . . (interest actually collected) is available for *transfer* from

2411 did not contravene 26 U.S.C. § 4462(f)(3) as the Federal Circuit erroneously held.

The Government also argues that the Court should not grant a writ regarding the jurisdictional component of the first question presented.[4] The Government contends that petitioner is barred from asserting the preclusive effect of the CIT's December 4, 1995 final judgment because petitioner did not raise this issue in the most recent Federal Circuit proceedings. Br. In. Opp. at 7-9. Petitioner does not deny that it did not raise this issue. Nor does petitioner deny that all parties stipulated in the CIT that the instant action should be designated as a "test case" to allow the Government the opportunity to appeal the CIT's award of interest under 28 U.S.C. § 2411. Pet. 35a.

As a matter of law, however, the preclusive effect of a final judgment is a threshold question concerning the jurisdiction of a federal court, which may not be governed by stipulation of the parties nor waived by a court. See Charles Alan Wright, *Law of Federal Courts,* 28 (5th ed. 1994) ("[T]he parties cannot confer on a federal court jurisdiction that has not been vested in the court by the Constitution and Congress. The parties cannot waive lack of jurisdiction. . . . *The court*, whether trial or appellate, *is obligated* to notice want of jurisdiction on its own motion, and it may well happen that the party who has invoked the jurisdiction of the federal court will challenge the jurisdiction . . . at a late stage of the proceedings after it has lost on the merits.") (citations omitted) (emphasis added). To be sure, petitioner has raised this issue belatedly, but it has appropriately requested that the Court grant certiorari to permit briefing on this determinative

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the fund and is reported by the Treasury Department to the Office of Management and Budget." App. 55a (parenthetical in original).

App. 55a, is also the correct appendix reference for the last paragraph of page 13 of the Petition, rather than 60a, which was a typographical error.

[4] *Supra* note 1.

issue. See Sup. Ct. R. 10(a) (certiorari may be granted where a "United States court of appeals has decided an important federal question in a way that . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers.").

It is well established that the preclusive effect of a final judgment includes all claims that were, or could have been, raised by an appellant. See Charles Alan Wright, *Law of Federal Courts*, 562 (5th ed. 1994) (citing Restatement (Second) of Judgments §§ 22-26 (1982)) ("'claim preclusion . . . requires all grounds upon which a single claim is based to be asserted and included in *one action, on pain of being barred from separate suit.*'") (emphasis added). Therefore, petitioner suggests that the Court grant the petition either to remand this issue for briefing and consideration by the Federal Circuit or to consider the merits. If the requisite elements of *res judicata* are met, the Court has no alternative but to vacate the decision in *International Business Machines Corp.* v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000).

The Government's opposition to the constitutional component of the first question and the second[5] and third questions[6] presented by the petition arise because the Federal Circuit justified embarking on a *de novo* review of the HMT by invoking the doctrine of sovereign immunity, revisited by the Court in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986). See *International Business Machines Corp.*, 201 F.3d

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[5] The second question presented by the petition is: Whether in holding the Harbor Maintenance Tax on exports unconstitutional in *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), the Court recognized that a taking of private property also occurred for which "just compensation" is required by the Fifth Amendment.

[6] The third question presented by the petition is: Whether the Government's retention of interest earned on monies collected under the unconstitutional Harbor Maintenance Tax on exports is a taking of private property for which "just compensation" is required by the Fifth Amendment.

at 1372. ("[W]e are bound by the ["no-interest"] rule [of *Shaw*] that the United States is liable for interest only if Congress has waived sovereign immunity by expressly consenting to an award of interest."). Because the Federal Circuit determined that the doctrine of sovereign immunity precludes the award of interest on HMT refunds, petitioner's Takings Clause claim is now ripe for adjudication. That doctrine, however, is not applicable where the Takings Clause has been violated:

> *Apart from constitutional requirements*, in the absence of specific provision by contract or statute, or "express consent . . . by Congress," interest does not run on a claim against the United States. *United States* v. *Louisiana*, 446 U.S. 253, 264-265 (1980), *quoting Smyth* v. *United States*, 302 U.S. 329, 353 (1937).

Shaw, 478 U.S. at 317 (emphasis added).

Contrary to the Government's claim, petitioner-appellee was not compelled to assert constitutional claims defensively to support the judgment of the CIT. In fact, there was no reason for petitioner-appellee to raise prematurely constitutional questions that the CIT had not yet adjudicated. App. 35a. Indeed, until the Federal Circuit embraced the doctrine of sovereign immunity to bar the award of interest it would have been improper for the CIT to consider these constitutional questions. Moreover, the Federal Circuit's reliance on *Shaw* to bar the payment of interest under the doctrine of sovereign immunity *before* petitioner's Takings Clause claim was adjudicated is erroneous as a matter of law and an abuse of discretion. The Federal Circuit was aware, not only from the pleadings in the CIT, but from the Government's brief (Br. In Opp. at 3) and rehearing briefs of petitioner and amici that petitioner's Takings Clause claim was still pending at the CIT. Nevertheless, the Federal Circuit continued to maintain that *Shaw* allows the Government to retain interest earned on monies secured by violating the United States Constitution. Petitioner is aware of no authority

that condones such greviously offensive conduct. *Marbury* v. *Madison*, 5 U.S. 137, 165 (1803) (stating whether a sovereign's action is immune "must always depend on the nature of that act.").

Therefore, it is not surprising that not even one of the cases cited by the Government precludes this Court's plenary review of constitutional questions raised and preserved in the trial court and for which certiorari properly has been requested.[7] On other occasions, where the Court has been presented with a record where a constitutional claim was raised and preserved at trial, as is the case here, either it has granted the petition for a writ of certiorari and resolved the question, particularly where the law is unsettled, see, *e.g.*, *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1012 n. 3 (1992) *citing First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 312-313 (1987) (certiorari granted where Takings Clause claims were at issue), or remanded to the lower courts for further consideration of the constitutional question, without prejudice to further review by the Court. See, *e.g.*, *McGoldrick*, 309 U.S. at 435 ("Upon the remand . . . courts will be free to decide any Federal question remaining

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[7] Every case cited by the Government stands only for the principle that new issues may not be raised beyond the scope of the questions granted by a petition for certiorari. See Br. In Opp. at 9-10 *citing Granfinanciera, S.A.* v. *Norberg*, 492 U.S. 33, 38-39 (1989) (having granted certiorari the Court declined to address argument "respondent failed to raise . . . because the question it poses has not been adequately brief and argued"); *Stone* v. *Powell*, 428 U.S. 465, 481 n.15 (1976) (declining to address "issue of the substantive scope of the writ [when it] was not presented in the petition for certiorari"); *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940) (record did not disclose whether respondents' arguments were presented); *American Nat'l Bank & Trust Co. of Chicago* v. *Haroco, Inc.*, 473 U.S. 606, 608-607 (1985) (having granted certiorari the Court declined to address a new question not presented in the petition); *Mazer* v. *Stein*, 347 U.S. 201, 206 n.5 (1954) ("We do not reach for constitutional questions not raised by the parties. . . . The fact that the issue was mentioned in argument does not bring the question properly before us.").

undecided here which, in conformity with their own procedure, may be raised for decision there, and the remand will be *without prejudice* to the further presentation of any such question to this Court.") (emphasis added).

Accordingly, the Court should grant the petition to consider all three of the questions presented. Regarding the first question presented, if the Court agrees that the jurisdictional issue raised concerning the preclusive effect of the CIT's 1995 final judgment requires adjudication, it may remand that issue to the Federal Circuit or reach the merits and reverse summarily or vacate that court's decision. In the alternative, if the Court grants the petition and determines that its ruling in *United States Shoe Corp.* that the HMT on exports is a tax necessarily requires the payment of interest under 28 U.S.C. § 2411, then the Court should reverse the decision of the Federal Circuit. On the other hand, if the Court grants the petition and decides that the Federal Circuit's statutory interpretation was correct, then petitioner's Takings Clause claim is ripe for adjudication, either by this Court or the CIT, *before* it can be determined whether or not the doctrine of sovereign immunity applies.

If the Court decides to consider and adjudicate the second question concerning petitioner's Takings Clause claim, no further lower court proceedings will be required. The Government's sole objection to this question is that it was not presented first to the Federal Circuit. Br. In Opp. at 7. Since this question asks the Court to clarify whether its decision in *United States Shoe Corp.*, 523 U.S. at 369 also determined that the Takings Clause was violated, it properly is addressed to this Court so that it may clarify the scope of a prior judgment.

Finally, if the Court decides to remand initial consideration of petitioner's Takings Clause claim to the CIT, the third question asks the Court to further clarify how the analysis of a *per se* taking and a regulatory taking should be conducted, so that additional appellate litigation about the appropriate standard of review is not required.

The Court should grant the petition for a writ of certiorari to consider the merits of all three questions presented.

Respectfully submitted,

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Dated: December 15, 2000
Washington, D.C.

UNITED STATES COURT OF INTERNATIONAL TRADE

JANE A. RESTANI, JUDGE

UNITED STATES SHOE CORPORATION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

JUDGMENT

Upon consideration of Plaintiff's Motion for an Order Settling Interest and Costs, defendant's response thereto, and all other proceedings had herein; and

WHEREAS, a three-judge panel of this Court entered a judgment for plaintiff on December 4, 1995, declaring the Harbor Maintenance Tax as imposed upon merchandise exported from the United States to be unconstitutional, enjoining the United States Customs Service from the assessment and collection of the Harbor Maintenance Tax in connection with merchandise exported from the United States, and awarding plaintiff a money judgment in the amount of $8,281.87, together with interest and costs as provided by law; and

WHEREAS this Court determined in Slip Op. 96-32 (February 7, 1996) that plaintiff is entitled to interest on the money judgment awarded in this case, pursuant to 28 U.S.C. § 2411; and

WHEREAS at the time the Court issued Slip Op. 96-32, the Government already had noticed an appeal of this case on February 1, 1996, and Slip Op. 96-32 specifically notes that

"notice of appeal has been filed and the court lacks jurisdiction to alter the judgment;" and

WHEREAS the December 4, 1995 judgment of the Court in this case was affirmed by the United States Court of Appeals for the Federal Circuit on June 3, 1997, in *United States Shoe Corp. v. United States*, 114 F.3d 1564 (Fed. Cir. 1997); and

WHEREAS the decision of the United States Court of Appeals for the Federal Circuit in *United States Shoe Corp. v. United States* was affirmed by the Supreme Court of the United States on March 31, 1998, in *United States v. United States Shoe Corp.*, 140 L. Ed. 2d 453, 118 S. Ct. 1290 (1988), which decision is now final; and

WHEREAS the stay of execution of the money judgment awarded to plaintiff and the effect of the declaratory and injunctive relief, ordered by the Court on December 4, 1995, by its terms automatically dissolved upon "the conclusion of any appellate proceedings"; and

WHEREAS defendant expressly reserves any right remaining to appeal the award of interest or any costs in this case;

WHEREAS, the court has previously determined that costs shall be awarded as provided by law, the court has discretion to award costs, and plaintiff pursued diligently this test case of minor principal value; it is hereby

(1) ORDERED that further briefing is not required and Slip Op. 96-32 is hereby readopted as the opinion of the court on the issue of interest.

(2) ORDERED that defendant pay plaintiff the principal amount owing of $8,281.87 within 60 days hereof;

(3) ORDERED that defendant pay plaintiff $403.63 in costs within 60 days hereof;

(4) ORDERED that defendant pay plaintiff interest on the aforementioned $8,821.87 principal, calculated under 28

U.S.C. § 2411, and that the payment obligation is stayed until 30 days after the time for appeal expires or appellate proceedings are complete.

/s/_____
Jane A. Restani
JUDGE

Dated: New York, New York
This 26th day of June, 1998.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

98-1574

UNITED STATES SHOE CORPORATION
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

98-1590

INTERNATIONAL BUSINESS MACHINES CORP.,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

ON MOTION

Before BRYSON, Circuit Judge.

ORDER

United States Shoe Corporation moves to stay the briefing schedule in appeal no. 98-1574 "until 30 days after the conclusion of all appellate proceedings in *International Business Machines Corp. v. United States,* Appeal No. 98-1590 before this Court and any higher Court." US Shoe states that the United States does not oppose.

US Shoe states that the Court of International Trade chose the IBM case as the "test case" to resolve the government's liability for interest on refunds of Harbor Maintenance Tax payments. US Shoe states that the Court of International Trade also entered judgment, including interest, in its case following the Supreme Court's decision in *United States v. United States Shoe Corp.*, 118 S.Ct. 1290 (1998).

Upon consideration thereof,

IT IS ORDERED THAT:

(1) US Shoe's motion is granted in part; appeal no. 98-1574 is stayed, pending this court's final disposition of appeal no. 98-1590. Within 21 days of the final disposition of appeal no. 98-1590, the United States shall provide the court with its views concerning how appeal no. 98-1574 should proceed. US Shoe may also notify the court of its views during that time.

(2) Copies of this order shall be transmitted to the merits panel assigned to hear appeal no. 98-1590.

December 1, 1998 /s/_____

William C. Bryson
Circuit Judge

cc: Harvey A. Isaacs, Esq.
Lara Levinson, Esq.
William D. Outman, II, Esq.

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.